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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 535

LEON JOSEPHSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 201–216) and dissenting (R. 216–230) opinions in the circuit court of appeals are not yet reported. The opinion of the district court appears at R. 190–194.

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1947 (R. 230). On December 23, 1947, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari through January 20, 1948 (R. 231). The petition for a writ of certiorari was filed January

17, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether, having appeared before a legislative subcommittee and having refused to be sworn and to answer any questions, petitioner has standing to challenge the authority of the subcommittee to propound a pertinent question to him.

2. Whether Public Law 601, prescribing the authority of the Committee, is unconstitutional.

3. Whether petitioner, having appeared before the committee, was properly prosecuted for having violated the second clause of R. S. § 102, which punishes the refusal to answer any question pertinent to the inquiry—or whether he should have been prosecuted under the first clause, which punishes the willful failure to respond to a summons of the Committee.

STATUTES AND RESOLUTION INVOLVED

Rev. Stat. § 102 (1875), as amended, 52 Stat. 942, 2 U. S. C. 192 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or

> concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the

Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On May 1, 1947, petitioner was indicted in the United States District Court for the Southern District of New York in one count charging a violation of R. S. § 102. The indictment (R. 5) is in the following terms:

The Grand Jury charges:

(1) Pursuant to Public Law 601, 79th Congress, and House Resolution 5, 80th Congress, dated January 3, 1947, including the Rules of Congress therein adopted and amended, the House of Representatives

was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Resolution.

(2) On the 5th day of March, 1947, at the Southern District of New York, Leon Josephson was summoned as a witness, by authority of the House of Representatives through its Sub-Committee of the Committee on Un-American Activities, to be sworn and to testify before the said Sub-Committee on matters of inquiry committed to said Committee.

(3) Leon Josephson did appear before the said Sub-Committee, pursuant to subpoena served upon him, at its session in the Federal Court Building, Southern District of New York, on March 5, 1947, but then and there refused to be sworn and to give any testimony before said Committee (Title 2, United States Code, Section 192).

The facts established at petitioner's trial are not in dispute. Petitioner is a member of the bar of New Jersey (R. 112–113). On February 4, 1947, a subpoena issued by the House Un-American Activities Committee was served on petitioner directing him to appear before the Committee in Washington on February 6, 1947 (R. 179). On February 5, petitioner sent the following telegram to the Committee (R. 176):

J. Parnell Thomas, Chairman, House Committee on Un-American Activities,

> Room 226, Old House Office Building. Unable appear before your Committee February 6th, due inadequate notice of less than 48 hours. Counsel advises me such short notice unreasonable and that I am entitled to reasonable notice. Willing appear at later date fixed by you if reasonable notice given me. Leon Josephson.

Arrangements were thereafter made for the appearance of petitioner before a sub-committee in New York City on March 5, 1947 (see R. 183). On that day petitioner was served with an additional subpoena (R. 79–81, 174), and he appeared before the sub-committee with counsel (R. 56, 177–178). He refused to be sworn (R. 56, 60, 64, 177–178, 180–181) and he refused to answer any questions (R. 56, 60, 64, 177, 181). The following is illustrative (R. 180–181):

> The CHAIRMAN. Mr. Josephson, will you stand and be sworn?
>
> Mr. JOSEPHSON. I will not be sworn.
>
> Mr. STRIPLING. Will you stand?
>
> Mr. JOSEPHSON. I will stand.
>
> (Mr. Josephson stands.)
>
> Mr. STRIPLING. Do you refuse to be sworn?
>
> Mr. JOSEPHSON. I refuse to be sworn.
>
> Mr. STRIPLING. You refuse to give testimony before this sub-committee?
>
> Mr. JOSEPHSON. Until I have had an opportunity to determine through the courts the legality of this committee.

The subcommittee then excused petitioner, subject to recall by the full committee or the subcommittee (R. 182).

Petitioner was convicted and sentenced to imprisonment for a term of twelve months and to pay a fine of $1,000 (R. 196). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed, Judge Clark dissenting (R. 201–230).

ARGUMENT

1. Petitioner has been convicted of contempt of Congress for his refusal before one of its Committees "to answer any question pertinent to the question under inquiry." As a defense to the charge he contends, in effect, that the Committee was without power to conduct any inquiry because the resolution defining the scope of its inquiry was so broad and vague as to permit it to inquire into matters protected by the First Amendment. We doubt, however, that petitioner has any standing to raise this question, since he has not shown that the Committee violated or threatened to violate any right guaranteed to him. Had petitioner submitted to questioning, he could then have refused to answer specific questions which he believed invaded his rights. If cited for contempt for failure to answer any such question, he could have defended on the grounds (1) that the specific question was not pertinent to any

subject which might properly be investigated by the Committee pursuant to its statutory authority; and (2) that if the resolution establishing the Committee was properly interpreted as authorizing the specific question, then the resolution to that extent was in conflict with the Constitution. *Sinclair* v. *United States,* 279 U. S. 263, 292. But petitioner chose to assert illegality of the Committee before any of his rights were infringed or threatened by the Committee. Under these circumstances it is questionable whether he has standing to raise any question as to the legality of the Committee or of its activities, "for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of." *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576. Petitioner "can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage." *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289. Cf. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Louis. & Nash. R. R. Co.* v. *Finn,* 235 U. S. 601, 610; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 156–157; *Arizona Employers' Liability Cases,* 250 U. S. 400, 429.

The cases cited by petitioner as supporting his standing to raise these objections (Pet. 22), are distinguishable. Thus, in *McGrain* v. *Daugherty*, 273 U. S. 135, defendant's standing to raise objections appears not to have been questioned. Further, the basic issue was whether Congress had power under any circumstances to compel appearance and testimony before it. In the instant case the inherent power of Congress to conduct investigations and to subpoena witnesses in connection therewith is not disputed. Petitioner's objection is simply that the particular resolution authorizing this Committee's investigation is unconstitutional. Similarly, jurisdictional questions, as opposed to issues of substantive validity of specific laws, were involved in *In re Sawyer*, 124 U. S. 200; *Ex parte Fisk*, 113 U. S. 713; and *Ex parte Rowland*, 104 U. S. 604.[1] The other cases cited by petitioner as supporting his contention of standing to contest the validity of the Committee's activities in this case all significantly involved situations in which a statute had been applied to a particular person so as to

[1] Cf. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 293: "* * * an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued." See also *United States* v. *Shipp*, 203 U. S. 563, 573.

impinge on his constitutional rights;[2] i. e., the person complaining had been injured. In the present case petitioner has been affected only by having been required to appear before the Committee and answer questions which it must be presumed would have been pertinent to the subject under inquiry by the Committee. Such mandatory appearance did not *per se* conflict with any right guaranteed petitioner, i. e., petitioner was not hurt merely by being required to appear and testify.

The majority below recognized that the decision in this case might well rest on petitioner's lack of standing to raise objections to the legality of the Committee and its activities (R. 212). The dissenting opinion of Judge Clark (R. 226–227) itself makes it clear that petitioner's purported standing to raise the issues is based not on any actual infringement of his constitutional rights, but rather on an anticipation that the Committee would ask specific questions which might invade

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[2] *Thornhill* v. *Alabama*, 310 U. S. 88—under the contested statute defendant's constitutional right to free speech had been denied.

Thomas v. *Collins*, 323 U. S. 516—the restraining order which defendant violated prohibited his exercise of the constitutionally guaranteed right to free speech.

Lovell v. *Griffin*, 303 U. S. 444—defendant was convicted, under the statute objected to, for having exercised his constitutional right of free speech.

Smith v. *Cahoon*, 283 U. S. 553—defendant's right to operate motor vehicles without complying with certain conditions imposed by the statute objected to had been denied.

his rights. Fear of anticipated injury is not sufficient to establish a right to raise a constitutional issue.

2. Assuming, *arguendo,* that petitioner has standing to challenge the authority of the Committee, the critical question which remains is one of power—the power of Congress to authorize the investigation in which petitioner refused to testify. In approaching this question, it is to be observed that there is no question here of the right of the Committee to propound or of the duty of petitioner to answer any *specific* question, for he withdrew from the inquiry before any specific questions were asked of him. Thus, it must be assumed that any question which might have been asked would have been pertinent to the inquiry and otherwise legitimate. And the sole question here is whether the Committee had the power to propound a question to petitioner which would have been consistent with the authority lodged in it. See *McGrain* v. *Daugherty,* 273 U. S. 135, 160.

The power of either branch of Congress to institute investigations and to compel evidence with a view to the possible exercise of the legislative function is indisputable. *McGrain* v. *Daugherty,* 273 U. S. 135, 171–175; *United States* v. *Norris,* 300 U. S. 564, 573. The necessity for the power exists in the very nature of the legislative function. As this Court stated in *McGrain* v. *Daugherty,* 273 U. S. at 175:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

It is in this context that the contentions in respect of Public Law 601 must be appraised. The Committee on Un-American Activities has been authorized to conduct investigations of—

> (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The purpose of the provision is apparent from its face—to secure information of a specified kind in order that any necessary remedial legislation may be enacted. It is urged that the authoriza-

tion is so broad as to be unlimited and thus to furnish petitioner no guide as to the permissible area for inquiry. But a fair regard for the words of the statute refutes the argument. The Committee is limited in its inquiry to propagandizing activity, and, further, only to propaganda activities which seek to subvert or undermine the principle of the form of government as guaranteed by our Constitution. It is not mere thought, but propaganda activities, which are the subject of the inquiry. And not all propaganda activities are pertinent; only those which seek to subvert the constitutional principle of our form of Government are subject to investigation.

In this age of propaganda warfare there is a knowable content in the statutory word "propaganda." It is not an indefinite concept which includes everything. And similarly it is difficult to believe that anyone would read the phrase "the principle of the form of government as guaranteed by our Constitution," as meaning anything other than the republican form of government, which, too, has specific content. "* * * the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan,* 139 U. S. 449, 461. Cf. Chief Justice Stone dissenting in *Schneiderman* v. *United*

States, 320 U. S. 118, 181. The words "subversive and un-American" which qualify "propaganda," when read in their context, are descriptive of the propaganda activities which are subject to investigation. While considered in isolation these words may have broad and different meanings to different people, there can be little question that they are calculated to authorize the Committee to seek information concerning propaganda activities which undermine the principle of the republican form of government. There is nothing in this case to indicate that anything other than such information was sought from petitioner.

In the view we take of the statute, it marks off a specified area of conduct for investigation and so informs the world. Obviously the statutes or resolutions establishing the authority of legislative committees are not bound by the same requirements as to definiteness as criminal laws, so long as the crime of not answering questions is sufficiently defined as it is here.[3] If there were any constitutional requirement that Congress clearly define the fields of inquiry of its investigating committees, acting within the constitutional authority of Congress, the standard of definiteness required would be more like that applied to statutes delegating authority to administrative

[3] There is no claim here that R. S. § 102, the criminal statute involved, is not sufficiently definite.

agencies.[4] Cf. *Fahey* v. *Mallonee*, 332 U. S. 245, 250.

It is said, moreover, that the statute permits an inquiry into sensitive matters which are protected by the First Amendment and imposes a limitless restraint on mere thought and opinion. And elaborate arguments are presented by petitioner and by the dissenting judge below which seek to emphasize the evils which result from imposing restraints on freedom of thought and speech. But this entire line of argument misapprehends what is self-evident. The statute imposes no restraints. After testifying before the committee a witness can believe, say and do the same things as he could before. The statute permits investigation only; it does not impose any limits on freedom of speech. Indeed, the statute does not permit the Committee to control even the propaganda activities which are the subject matter of its investigations. Since there is no interference with First Amendment rights, the statute cannot be in violation of the Amendment.

We are thus brought to the vital issue in the case: Does the statute authorize the ascertainment of facts which can be of aid to the Congress

[4] Although we do not believe determination of that issue necessary to disposition of this case, we doubt that resolutions establishing congressional committees are subject to a requirement of definiteness. Compare e. g., the jurisdiction exercised by the House Ways and Means and Appropriations Committees.

in legislating? If it seeks information concerning matters which are not fit subjects of legislation, the courts may, of course, strike it down. *Kilbourn* v. *Thompson,* 103 U. S. 168. But if there is an area for legislative action, no matter how circumscribed, it is the responsibility of the courts not to interfere. The wisdom of conducting the investigation is for the judgment of Congress. Both petitioner and the dissenting judge below seemingly assume that their distaste for the Committee and its activities justifies judicial interference. A decent respect for the judgment of the legislative branch of our government requires, however, that policy decisions concerning the functioning of the Committee should be left to Congress, whose creature the Committee is.

Notwithstanding that the area for legislation concerning propaganda activities may be narrow, there is a well recognized field for legislation. From the information which the Committee receives, it conceivably could conclude that certain propaganda activities have reached the stage where they present a "clear and present" danger of bringing about a substantive evil, such as the overthrow of our form of government by means inconsistent with the Constitution and that remedial legislation is necessary. Cf. *Dunne* v. *United States,* 138 F. 2d 137 (C. C. A. 8), certiorari denied, 320 U. S. 790. The Committee may learn that foreign governments are carrying on propaganda warfare in our midst with a view

to undermining our constitutional principles through aliens who enter our shores. Such information could result in the amendment of our immigration laws to close even more tightly our boundaries to classes of persons believed to be engaged in such activities. The data disclosed by the investigation might show the necessity for increasing our internal security forces, and legislation and appropriations for this purpose could be initiated, or it might show that there is no need for additional legislation. Other examples are collected in the opinion of the court below (R. 211–212). The short of the matter is that even in the area of speech Congress is not impotent to deal with serious dangers to the nation. This being so, it cannot be said that the Committee's inquiry was not in aid of possible legislation.

We have, then, a statute authorizing investigation, not into beliefs, but into action. The authorization is limited to a specific evil—propaganda activity which seeks to undermine our form of government. And the information to be obtained from such an investigation is capable of being in aid of possible remedial legislation. This being so, the Committee was fully empowered to summon petitioner and to seek information from him. Only if a specific question put to petitioner by the Committee exceeded the bounds of the Committee's power or was not pertinent to the inquiry would he have justification for refusing to answer. *McGrain* v. *Daugherty,* 273 U. S. at

176; *Sinclair* v. *United States,* 279 U. S. 263, 292.

3. The contention (Pet. 24–26) that the indictment and proof failed to establish an offense within the purview of R. S. § 102 is, as the opinion below demonstrates (R. 203–204),[5] without merit.

R. S. § 102 describes two different offenses. The first clause, relating to one who has been summoned before a Committee and wilfully makes default, reaches the act of a person who, having been subpoenaed, fails to appear, as in *McGrain* v. *Daugherty,* 273 U. S. 135, or who appears but fails to remain in attendance until excused, as in *Townsend* v. *United States,* 95 F. 2d 352 (App. D. C.), certiorari denied, 303 U. S. 664. The second clause punishes anyone who, having appeared, "refuses to answer any question pertinent to the question under inquiry." It reaches the conduct of anyone who appears before a Committee, whether or not pursuant to a summons (*Sinclair* v. *United States,* 279 U. S. 263, 291), and refuses to give information pertinent to the inquiry. Petitioner was convicted for this offense.

It is plain that petitioner did not fail to appear in response to the summons, nor did he fail to remain in attendance after having appeared.

[5] The dissenting judge did not disagree with the court on this issue.

Petitioner appeared and was subsequently excused, subject to call by the full committee or the subcommittee (*supra*, pp. 6–7). His misconduct consisted of his refusal to give information to the subcommittee which was pertinent to the inquiry, and this is within even the literal terms of the second clause of R. S. § 102. In the words of the statute, he refused "to answer any question pertinent to the question under inquiry."

It is no answer to urge, as does petitioner (Pet. 25–26), that he was not charged with refusal to answer any specific question. The statute does not limit itself to a specific question. It strikes as vigorously at the refusal to answer all questions as it does at the refusal to answer any one question. By refusing to be sworn or to testify, petitioner plainly violated the statute.

Petitioner's complaint (Pet. 25) that by prosecuting him under the second clause of the statute rather than the first the Government eliminated the element of wilfulness from the case and prevented him from showing that he did not act wilfully is more imaginary than real. In the first place, the facts foreclose any conclusion other than that petitioner acted wilfully. For with the advice of counsel he unqualifiedly refused to be sworn or to answer any questions in order to test the legal authority of the Committee. A plea at this point of surprised innocence hardly is consistent with the avowed purpose to defy the Committee. And, secondly, substantially the

same element of purposeful misconduct is included in the offense for which petitioner was convicted. The second clause reaches only a person who "refuses" to answer any question pertinent to the inquiry. To refuse contemplates something more than an innocent failure to comply. It requires that the witness shall be aware of his obligation to answer questions and shall purposefully decline to do so. As this Court has held, it requires an intentional violation. *Sinclair* v. *United States,* 279 U. S. 263, 299. The jury was instructed, in the language of the *Sinclair* opinion, that (R. 140)—

> The gist of the offense is refusal to answer any questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt.

The same instruction as to wilfulness would have been appropriate if the prosecution had been under the first clause of the statute. See *Fields* v. *United States,* 164 F. 2d 97, 100 (App. D. C.), certiorari denied, January 12, 1948, No. 458, this Term.*

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* The court properly did not instruct the jury that they must find petitioner not guilty if they were satisfied that he had not been lawfully summoned to the inquiry (R. 144; see R. 140), for the validity of the summons is not an issue in the case. This Court has held that "Section 102 plainly extends to a case where a person voluntarily appears as a witness without being summoned as well as to the case of one required to attend." *Sinclair* v. *United States*, 279 U. S. 263, 291.

CONCLUSION

Petitioner has defied the authority of a duly constituted Committee of the House of Representatives. Nothing adduced at the trial shows that the Committee attempted to inquire concerning any matter other than that properly authorized by Congress. The authorization was to secure information properly in aid of the legislative function, for even in the area of speech Congress may, as it has, legitimately enact remedial measures to combat threatened dangers to our institutions.

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

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